STATE OF MICHIGAN

COURT OF APPEALS

DIANE ELISABETH GAYNOR,

Plaintiff-Appellant,

v

JOHN M. CILLUFFO, M.D., and JOHN M. CILLUFFO, M.D., P.C.,

Defendants-Appellees,

and

MUNSON HEALTHCARE, MUNSON MEDICAL CENTER, and MUNSON MEDICAL CENTER & HOSPITAL,

Defendants.

UNPUBLISHED
March 14, 2006

No. 257466
Grand Traverse Circuit Court
LC No. 03-022923-NH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition in this medical malpractice action. We affirm.

On July 28, 2003, plaintiff filed a medical malpractice action alleging that she was injured by the professional negligence of defendant Dr. Cilluffo, a board certified neurosurgeon. Plaintiff alleged that his surgical treatment of a massive disc herniation on August 19, 2001, caused her foot drop and other conditions. With the complaint, plaintiff filed an affidavit of merit prepared by Dr. Donald Austin. The affidavit provided that Dr. Austin was "a medical doctor and Board Certified by the American Board of Neurological Surgery." Dr. Austin opined that defendant Dr. Cilluffo had breached the standard of care and that this breach was the proximate cause of plaintiff's injuries.

Dr. Cilluffo was board-certified in and actively practiced neurosurgery. Dr. Austin, although board certified in neurosurgery, had not performed any surgery since July 1998. From August 2000 to August 2001,[1] Dr Austin did not have surgical privileges in or perform rounds at any hospital. He did not instruct residents during the relevant time period. Rather, it was alleged that the bulk of Dr. Austin's current practice consisted of performing independent medical examinations, performing case evaluations for attorneys, and writing books. Defendants brought the motion for summary disposition at issue alleging that Dr. Austin's affidavit of merit was not valid because he did not devote a majority of his professional time to the same type of practice as Dr. Cilluffo during the relevant time period. In response, plaintiff provided affidavits from her attorneys to establish that, at the time of filing, counsel held a reasonable belief that Dr. Austin had engaged in the same practice as Dr. Cilluffo during the relevant time period. The affidavits relied on Dr. Austin's curriculum vitae, which stated that he was board certified in neurosurgery. Counsel also relied on the doctor's communication to them that he was actively practicing medicine when he filed the affidavit of merit, the fact that he had served as an expert in neurosurgery cases before, and a claim that he was familiar with both the applicable standard of care and the procedure. The trial court granted the defense motion for summary disposition, concluding that there was no indication that Dr. Austin had been asked about his qualifications to support the assertion that counsel had a reasonable belief at the time of filing the affidavit.

Plaintiff alleges that counsel held a reasonable belief that Dr. Austin was qualified to present an affidavit of merit because he indicated that he had handled similar cases before and was engaged in the active practice of medicine. We disagree. An order granting summary disposition is reviewed de novo. *Wilcoxon v Minnesota Mining & Mfg Co,* 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless specifically contradicted by affidavits or other appropriate documents. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the nonmoving party to decide whether there is any genuine issue of material fact that would entitle the nonmoving party to judgment as a matter of law. *Diamond v Witherspoon,* 265 Mich App 673, 681; 696 NW2d 770 (2005).

When an action alleging medical malpractice is filed by an attorney, the attorney shall file an affidavit of merit from a health professional "who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." With regard to expert witnesses, MCL 600.2169(1)(a) provides that if the defendant is a specialist or board certified in a particular specialty, the countering expert must have the same qualifications. See also *Halloran v Bhan*, 470 Mich 572, 577-579; 683 NW2d 129 (2004). This same specialization exists "at the time of the occurrence." MCL 600.2169(1)(a). When the complaint is filed no discovery is available, and the affidavit of merit filed with the complaint must be signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169. *Grossman v Brown*, 470 Mich 593, 598-599; 685 NW2d 198 (2004). However, at

[1] For brevity, we refer to the period from August 2000 to August 2001 as "the relevant time period."

trial, a person may not give expert testimony unless the requirements of MCL 600.2169 are satisfied. *Id.*

In *Grossman, supra*, the Court held that the plaintiff's attorney held a reasonable belief based on the information available regarding the expert's qualifications when he consulted the American Medical Association website and was advised that there was no vascular surgery board certification. However, it is not reasonable for counsel to rely on the beliefs of a third party regarding the qualifications of an affiant. *Geralds v Munson Healthcare*, 259 Mich App 225, 232; 673 NW2d 792 (2003). It is unreasonable for an attorney to form an opinion regarding the qualifications of an expert witness without making inquiry of the expert. *Id*. at 233. If the affidavit of merit is defective, plaintiff has failed to properly commence a medical malpractice action. *Id*. at 240.

In the present case, plaintiff's counsel utilized Dr. Austin because he was referred by another attorney, had provided testimony in the past, and charged reasonable fees. Both attorneys for plaintiff indicated that Dr. Austin represented that he had an active practice and had handled these types of cases, but not the exact same procedure at issue. However, because co-counsel for plaintiff had utilized Dr. Austin in the past to present testimony then, prior to the discovery deposition, it would have been known that Dr. Austin had been retired from an active surgical practice for seven years. Currently, his active practice consisted of independent examinations, case evaluations, and writing books. This prior relationship is contrary to the assertion that there was a reasonable belief regarding the affiant's *current* ability to meet the requirements of MCL 600.2169 at the time of the alleged malpractice at issue. Accordingly, the trial court properly granted defendant's motion for summary disposition.[2]

Affirmed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood

[2] Although not alleged in the statement of questions presented, plaintiff also contends that the proper test for determining the qualifications of an expert witness in a medical malpractice action is mere familiarity with the appropriate standard of care, citing *Dybata v Kistler*, 140 Mich App 65; 362 NW2d 891 (1965). The common law will prevail except when it is abrogated by Constitution or statute. *Bugbee v Fowle*, 277 Mich 485, 492; 269 NW 570 (1936). After the *Dybata* decision, the Legislature modified the rules regarding qualifications of expert witnesses by statute. Accordingly, plaintiff's reliance on *Dybata* is without merit. We also note that plaintiff does not allege that Dr. Austin satisfied the qualifications set forth in MCL 600.2169.